TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1912.

No. [illegible] 478.

TOBIAS MILLER, PLAINTIFF IN ERROR,

vs.

SECONDO GUASTI AND JUAN A. BERNARD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 6, 1911.

(22,953)

(22,953)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 877.

TOBIAS MILLER, PLAINTIFF IN ERROR,

vs.

SECONDO GUASTI AND JUAN A. BERNARD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original	Print
Caption	*a*	1
Papers on appeal to court of appeals	*a*	1
Statement under rule 41	1	1
Notice of appeal	2	1
Order appealed from	3	2
Notice of motion	5	3
Petition of Tobias Miller	6	4
Affidavit of Secondo Guasti	10	6
Secondo Guasti	12	7
Juan A. Bernard	18	10
Albert M. Yuzzolino	20	11
Elmer Rodrigo	23	13
Harold R. Lhowe	26	14
Ernest C. Romano	28	15
L. J. Vance	30	16
Certificate of Julia Miller	33	17
Certificate of Tobias Miller	34	18
Affidavit of Tobias Miller	35	19
Affidavit of William L. Morck	39	21
Opinion of Newberger, J.	42	22
Notice of appeal to court of appeals	42	22

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 9, 1912.

	Original	Print
Order of appellate division	44	23
Affidavit of no opinion	45	23
Stipulation waiving certification	45	24
Remittitur from court of appeals	49	24
Judgment on remittitur	49	25
Opinion of court of appeals	52	26
Bond on writ of error	54	28
Writ of error	58	30
Citation and service	61	31
Petition for writ of error	63	32
Allowance of writ of error	67	34
Exhibit A—Opinion of court of appeals	69	35
Assignment of errors	73	37
Clerk's certificate	75	37
Prayer for reversal	77	38

a Court of Appeals, State of New York.

SECONDO GUASTI and JUAN A. BERNARD, Plaintiffs-Respondents,
against
TOBIAS MILLER, Defendant-Appellant.

Papers on Appeal from Order.

Jesse S. Epstein, Attorney for Defendant-Appellant, 149 Broadway, New York City.
Ullo, Ruebsamen & Yuzzolino, Attorneys for Plaintiffs-Respondents, 11 Broadway, New York City.

1 Court of Appeals, State of New York.

SECONDO GUASTI and JUAN A. BERNARD, Respondents,
against
TOBIAS MILLER, Appellant.

Statement under the Rule.

This is an appeal from an order of the Appellate Division entered on May 3rd, 1911, affirming an order entered in the office of the Clerk of the County of New York on the twentieth day of March, 1911, denying the defendant's motion to cancel a judgment pursuant to Section 1268 of the Code of Civil Procedure.
The names of the original parties are given in full in the above title and no change of parties or attorneys has taken place.

2 *Notice of Appeal.*

New York Supreme Court, New York County.

SECONDO GUASTI and JUAN A. BERNARD, Plaintiffs,
against
TOBIAS MILLER, Defendant.

SIRS: Please take notice that the defendant hereby appeals to the Appellate Division of the New York Supreme Court of the State of New York, First Department, from an order entered in the office of the Clerk of the County of New York on the 20th day of March, 1911, denying the defendant's motion to cancel a judgment obtained by the above named plaintiffs against the above named defendant on

April 16, 1895, and the defendant appeals from each and every part of the said order.

Dated, New York, March 22nd, 1911.

Yours, etc.,
JESSE S. EPSTEIN,
Attorney for Defendant.

Office and Post Office Address, 149 Broadway, Borough of Manhattan, New York City.

3 To Messrs. Ullo, Ruebsamen & Yuzzolino, Attorneys for Plaintiffs.

To William F. Schneider, County Clerk.

Order Appealed From.

At a Special Term, Part I, of the Supreme Court of the State of New York, Held in and for the County of New York, at the County Court House Thereof, Borough of Manhattan, City and State of New York, on the 20th Day of March, 1911.

Present: Hon. Joseph E. Newburger, Justice.

SECONDO GUASTI and JUAN A. BERNARD, Plaintiffs,
against
TOBIAS MILLER, Defendant.

A motion having been made by the above named defendant, upon his affidavit and certified copy of the discharge in bankruptcy, for an order cancelling the judgment obtained by the above named plaintiffs against the above named defendant on April 16, 1895, and the same having duly come on to be heard at a Special Term Part I of this Court, on the 15th day of March, 1911, and after hearing Jesse S. Epstein, Esq., counsel for the defendant in support
4 of said motion, and Albert M. Yuzzolino, of counsel for the plaintiffs, in opposition thereto, and after due deliberation having been had thereon,

Now, on reading and filing the notice of said motion dated January 20, 1911, together with the affidavit of Tobias Miller, verified the 20th day of January, 1911, and the certified copy of the Certificate of Discharge annexed thereto, and also the replying affidavits of Tobias Miller and William L. Morck, each verified the 14th day of March, 1911, all offered in support of the said motion, and the affidavit of Secondo Guasti, verified the 18th day of February, 1911, together with certificate of H. J. Le Quade, Clerk of Los Angeles County, dated February 18, 1911, the affidavit of Secondo Guasti, verified the 7th day of November, 1910, together with certificate of C. G. Keyes, Clerk of Los Angeles County, dated November 9, 1910, the affidavit of Juan A. Bernard, verified the 28th day of February, 1911, and certificate of Wm. P. Cole, Clerk of Baltimore County, Md., dated March 2, 1911, the affidavit of Albert M. Yuzzolino, verified the 18th day of February, 1911, the affidavit of Elmer Rodrigo, verified the 29th day of November, 1910, the affidavit of

Harold R. Lhowe, verified the 18th day of February, 1911, the affidavit of Ernest C. Romano, verified the 21st day of February, 1911, the affidavit of L. J. Vance, verified the 17th day of February, 1911, and Exhibits Nos. 1, 2 and 3, attached to the said affidavits, and all offered in opposition to said motion,

Now, on motion of Ullo, Ruebsamen & Yuzzolino, attorneys for the plaintiffs, and upon filing the opinion of the Court, it is hereby

5 Ordered, that the said motion of the defendant for an order cancelling the judgment obtained by the plaintiffs herein named, against said defendant, on April 16, 1895, be and the same is hereby in all respects denied.

Enter,

J. E. N., *J. S. C.*

Notice of Motion Read in Behalf of Appellant.

Supreme Court, New York County.

SECONDO GUASTI and JUAN A. BERNARD, Plaintiffs,
against
TOBIAS MILLER, Defendant.

SIRS: Please take notice that upon the annexed petition of Tobias Miller, verified the 20th day of January, 1911, the certificate and the certified copy of discharge attached thereto, the undersigned will move this Court at Special Term, Part I thereof, to be held in the County Court House, City of New York, Borough of Manhattan, on the 16th day of February, 1911, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order cancelling the judgment obtained by the above named plaintiffs against the above named defendant on April 16th, 1895, and for such other,

6 further and different relief as to the Court may seem just and proper in the premises.

Dated, New York, January 20th, 1911.

JESSE S. EPSTEIN,
Attorney for Defendant.

Office and P. O. Address, 149 Broadway, Borough of Manhattan, New York City.

To Secondo Guasti and Juan A. Bernard.

To Messrs. Ullo, Ruebsamen & Yuzzolino, Attorneys for Secondo Guasti, 11 Broadway, New York City.

Petition of Tobias Miller, Read in Support of Motion.

Supreme Court, New York County.

SECONDO GUASTI and JUAN A. BERNARD, Plaintiffs,
against
TOBIAS MILLER, Defendant.

To the Supreme Court of the State of New York:

The petition of Tobias Miller respectfully represents:

That this action was brought in the year Eighteen hun-
7 dred and ninety-five, for goods, wares and merchandise sold and delivered by the plaintiffs to the defendant, and on the 16th day of April, 1895, a judgment was recovered in favor of the plaintiffs and against the defendant for the sum of $1,085.40, which judgment was duly docketed in the office of the Clerk of this Court on the 16th day of April, 1895.

That thereafter and on or about the 26th day of December, 1902, petitioner was duly adjudged a bankrupt by the United States District Court for the Southern District of New York, which Court had jurisdiction to so adjudge petitioner bankrupt.

That thereafter, petitioner duly filed schedules according to law in the office of the Clerk of the said United States District Court for the Southern District of New York, in which schedules appeared the name and debt of the plaintiffs herein, and upon information and belief, this plaintiff received due notice of the pendency of such proceedings and had actual knowledge thereof.

That thereafter such proceedings were had that on the 9th day of May, 1903, a decree was entered in the United States District Court for the Southern District of New York, discharging the defendant in the above entitled action from all debts provable in bankruptcy at the date of his adjudication.

That the debt for which this judgment was obtained was not due as a tax levied by the United States, the State, County, District or Municipality in which the petitioner resides, nor was it a liability for obtaining money by false pretenses or false representations, nor for wilful and malicious injury to the person or property of the plaintiff, nor for alimony due or to become due, nor for the maintenance and support of wife and child, nor for the seduction of an unmarried female, nor for criminal conversation, nor was said debt
created by fraud, embezzlement, misappropriation of defalca-
8 tion while acting as an officer in any fiduciary capacity, and that said debt was duly scheduled in time for proof and allowance with the name of the plaintiffs therein.

That hereto annexed is a certified copy of the decree of the United States District Court for the Southern District of New York, discharging this petitioner from all his debts provable against his estate in bnakruptcy as was set forth.

That more than one year has elapsed since the entry of the said decree.

Wherefore, petitioner prays that an order may be made herein, cancelling the said judgment of record, and directing the Clerk of this Court to mark the same cancelled and discharged, for which no previous application has been made.

Dated, New York, January 20, 1911.

TOBIAS MILLER, *Petitioner.*

STATE OF NEW YORK,
County of New York, ss:

Tobias Miller, being duly sworn, deposes and says: that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

TOBIAS MILLER.

Sworn to before me this 20th day of January, 1911.

V. BROTHERS,
Commissioner of Deeds, New York City.

9 District Court of the United States, Southern District of New York.

No. 5521.

Whereas, Tobias Miller, in said District, has been duly adjudged bankrupt under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this Court that said Tobias Miller be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 26th day of December, A. D. 1902, on which day the petition for adjudication was filed by him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable George C. Holt, Judge of said District Court, and the seal thereof, this 9th day of May, A. D. 1903.

GEO. C. HOLT,
District Judge.

THOMAS ALEXANDER, *Clerk.*

I, Thomas Alexander, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the above is a true copy of an order of discharge made in the above-entitled matter.

In testimony whereof I have caused the seal of the said Court to be hereto affixed, at the City of New York, in the Southern District of New York, this 20th day of January, the year of our Lord one thousand nine hundred and eleven and of the independence of the said United States the one hundred and thirty-fifth.

THOMAS ALEXANDER, *Clerk.*

10 *Affidavit of Secondo Guasti Read in Opposition to Motion.*

Supreme Court, New York County.

SECONDO GUASTI et al., Plaintiffs,
against
TOBIAS MILLER, Defendant.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Secondo Guasti, being duly sworn, deposes and says: I am one of the plaintiffs named in the above entitled action, and in reply to the petition of Tobias Miller herein in his application for an order cancelling the judgment obtained by me and Juan A. Bernard against said defendant on April 6th, 1895, I desire to re-assert and re-affirm the facts to be as set forth in my affidavit annexed hereto and subscribed and sworn to by me on the 7th day of November, 1910.

In addition to the matter set forth in said affidavit, I desire to state that in the Fall of the year 1907, the defendant Tobias Miller came to Los Angeles, California, and saw me at my office, which was then at No. 1234-1248 Palmetto Street, Los Angeles. I had a long conversation with him on that occasion. Among other things I spoke to him concerning the judgment which I had ob-
11 tained against him, as mentioned herein, and asked him why he did not pay me what he owed thereon; and I also told him that I was willing to take notes from him in payment of the judgment in case he should not be ready to pay me in cash; to this he replied and said to me, "Mr. Guasti, just let me alone for the present. I have just got on my feet again, and when I get settled I will pay you."

As is already stated in my said affidavit of November 7, 1910, I did not know at this time that Mr. Miller had gone into bankruptcy, or had received a discharge or that he contemplated any such step, and he did not say one word to me about any bankruptcy proceedings having been taken by him, although I demanded, as above stated, payment of my judgment.

SECONDO GUASTI.

Sworn to before me this 18th day of February, 1911.

RALPH BANDINI,
Notary Public in and for the
County of Los Angeles, State of California.

(My commission expires December 12, 1911.)

(County Clerk's Certificate.)

12 *Affidavit of Secondo Guasti Read in Opposition to Motion.*

Supreme Court, New York County.

SECONDO GUASTI et al., Plaintiffs,
against
TOBIAS MILLER, Defendant.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Secondo Guasti, being duly sworn, deposes and says as follows: I am the plaintiff named in the above entitled action, and am also the same person named as one of the plaintiffs in an action commenced in the City Court of the City of New York, entitled "Secondo Guasti and Juan A. Bernard vs. Tobias Miller," in which action a judgment was duly recovered in favor of myself and said Juan A. Bernard on the 16th day of April, 1895, and against the said Tobias Miller for the sum of One thousand and eighty-five and 40/100 ($1,085.40) dollars.

That the said Tobias Miller named in the said action in the City Court of the City of New York and against whom the said judgment was obtained, as above stated, is the same Tobias Miller named herein; and the judgment so rendered and obtained in the City Court of the City of New York was duly rendered after personal service
13 of the summons and complaint in the said action upon the said Tobias Miller.

That the judgment roll in the said action was thereafter duly filed and the said judgment duly entered and duly docketed in the judgment book in the office of the Clerk of the City Court of the City of New York on the said 16th day of April, 1895, and a transcript thereof was thereafter duly filed and docketed in the office of the Clerk of the County of New York on the said 16th day of April, 1895.

That thereupon, to wit: on the said 16th day of April, 1895, an execution was issued upon the said judgment to the Sheriff of the County of New York, being the County in which the said Tobias Miller then resided; and on the 15th day of June, 1895, the said execution was duly returned by the said Sheriff of the County of New York wholly unsatisfied.

That thereafter, to wit: on or about the 15th day of April, 1898, the said Juan A. Bernard, hereinbefore mentioned, duly assigned and transferred to me all his right, title and interest in and to the said judgment against Tobias Miller, and I have been ever since and still am the sole owner of said judgment.

That no part of said judgment has been paid, and the same is now wholly unpaid, and there is due thereon to me from the said Tobias Miller the said sum of One thousand and eighty-five and 40/100 ($1,085.40) dollars, with interest thereon from the 16th day of April, 1895.

That on or about the 15th day of August, 1910, I retained the

firm of Ullo, Ruebsamen & Yuzzolino as my attorneys, to take such proceedings as they considered favorable for the purpose of
14 collecting said judgment, and after investigations made by my said attorneys, I received from them on or about the 23rd day of August, 1910, a letter, in which they informed me that they had found that the said Tobias Miller had gone through bankruptcy and was granted a discharge, in or about the year 1903, the details of which will more particularly appear from the affidavit of Albert M. Yuzzolino, one of my attorneys, which is hereto annexed.

That the said letter of my said attorneys, which I received about August 23, 1910, as aforesaid, was the first notice, information or knowledge that I had of any bankruptcy proceedings taken by or against the said Tobias Miller, or that he had received a discharge in bankruptcy, and prior to the said 23rd day of August, 1910, I had not known that said Tobias Miller had gone into bankruptcy or that he had intended to go into bankruptcy or that he had made any application for adjudication in bankruptcy, or for the granting of a discharge, and have never received any notice from him or from any source whatever, either by mail or otherwise, of any such bankruptcy proceedings, or of any application for a discharge in bankruptcy, and, on information and belief, that the said Juan A. Bernard never received any notice of said proceedings either by mail or otherwise, and never had any knowledge of the same.

That at the time of the commencement of the action against Tobias Miller in the City Court of the City of New York, as herein stated, to wit: about April 9, 1895, and for many years prior thereto, I have been a resident of the City of Los Angeles, California, and my post office address was at that time, and had been for
15 many years, "Los Angeles, California," and has been and remained the same ever since that date, and is the same now and was also the same during the years 1902 and 1903, which are the years, as I have been informed by my said attorney, during which the said Tobias Miller was adjudicated a bankrupt and obtained his discharge.

That in the schedules of liability filed by the said Tobias Miller, as I have been informed by my said attorney, the judgment herein mentioned is scheduled as follows: "Name of Creditor-, Guasti & Bernard; residence unknown, California; consideration for indebtedness, judgment obtained and filed April 16, 1895."

That the claim on which the judgment herein mentioned was obtained against the said Tobias Miller arose from business transactions, and is based on an acceptance of a draft drawn against the said Tobias Miller, which draft contains on the face thereof my post office address as "Los Angeles, California," and which is in full as follows:

"Guasti & Bernard, No. 23.

Los Angeles, Cal., *Nov. 18th,* 1894.

On Feb. 19th, 1895, Pay to the Order of ourselves One thousand

& Fifty-five & 60/100 Dollars. Value received and charge the same to the account.

(Signed) GUASTI & BERNARD.

To Tobias Miller, No. 581 Third Ave., New York.

Accepted,
T. MILLER."

16 Said draft was given in payment of a carload of wine purchased by said Miller from me in Los Angeles, California. That my business at the time of the said judgment was producer of and dealer in California wines, and my business has remained uninterruptedly the same and at the same address, to this date, and was of the same character and at the same address during the years 1902 and 1903.

That the only time I have met Mr. Miller personally since 1895 was in 1907, when I met him on the street in Los Angeles, California; Mr. Miller made no reference to any bankruptcy proceedings, but promised me then when he got upon his feet he would do something for me.

That at intervals since 1907 Mr. Miller, through his representatives in Los Angeles, California, has continued to trade with me, or rather with the Italian Vineyard Company, of which I am President and Manager.

SECONDO GUASTI.

Sworn to before me this 7th day of November, 1910.
RALPH BANDINI,
Notary Public in and for the County of Los Angeles, State of California.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, C. G. Keyes, Clerk of the County of Los Angeles (and ex-officio Clerk of the Superior Court of the State of California, in and for said County, the same being a court of record of the
17 aforesaid County, having by law a seal), do hereby certify that Ralph Bandini, whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking of said acknowledgment, proof or affidavit a Notary Public duly commissioned and sworn, and residing in said County, and was, as such, an officer of said State, duly authorized by the laws thereof to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing to be recorded in said State, and that full faith and credit are and ought to be given to his official acts; and I further certify that I am well acquainted with his handwriting and verily believe that the signature to the attached certificate is his genuine signature, and further that the annexed instrument is executed and acknowledged according to the laws of the State of California.

In Witness Whereof I have hereunto set my hand and affixed my official seal this 9th day of Nov., 1910.

C. G. KEYES,
County Clerk and ex-Officio Clerk of the Superior Court of Los Angeles County, State of California.

18 *Affidavit of Juan A. Bernard Read in Opposition to Motion.*

Supreme Court, New York County.

SECONDO GUASTI et al., Plaintiffs,
against
TOBIAS MILLER, Defendant.

STATE OF MARYLAND,
County of Baltimore, ss:

Juan A. Bernard, being duly sworn, deposes and says as follows: I am one of the plaintiffs named in an action commenced in the City Court of the City of New York, entitled "Secondo Guasti and Juan A. Bernard vs. Tobias Miller," in which action a judgment was duly recovered in favor of plaintiffs and against said defendant Tobias Miller on the 16th day of April, 1895, for the sum of $1,085,44. The said action was based on an indebtedness due from the said Tobias Miller to myself and Secondo Guasti, based on an acceptance of a draft drawn by the firm of Guasti & Bernard on November 18th, 1894—of which firm I was a partner—upon the said Tobias Miller, and which draft was accepted by the latter.

I have since assigned all my right, title and interest in said judgment obtained against Tobias Miller, as aforesaid, to Secondo Guasti, the other plaintiff named in said action.

19 At the time the said judgment against Tobias Miller was obtained I resided at Los Angeles, California.

I have been informed by a letter received by me from S. Guasti on or about the 17th day of November, 1910, that Tobias Miller had gone through bankruptcy proceedings in or about the year 1902 or 1903 and was granted a discharge in bankruptcy in the year 1903.

Said letter of said S. Guasti was the first information, notice or knowledge that I received of any bankruptcy proceedings taken by or against said Tobias Miller, or that he had received a discharge in bankruptcy; and prior to the said 17th day of November, 1910, I did not know that the said Tobias Miller had gone into bankruptcy or that he had intended to go into bankruptcy, or that he had made any application for an adjudication in bankruptcy, or for the granting of a discharge in bankruptcy, and I have never received any notice from him or from any source whatever, either by mail or otherwise, of any such bankruptcy proceedings or of any application for a discharge in bankruptcy, and I never had any knowledge of the same.

JUAN A. BERNARD.

Sworn to before me this 28th day of February, 1911.

——— ———.

(County Clerk's Certificate.)

Personally appeared before me Juan A. Bernard and made oath that the above statement — just and true to the best of his knowledge and belief this 28th Feb., 1911.

[NOTARY'S SEAL.] J. THOMAS MILLER,
Notary Public.

20 *Affidavit of Albert M. Yuzzolino Read in Opposition to Motion.*

Supreme Court, New York County.

SECONDO GUASTI and JUAN A. BERNARD, Plaintiffs,
against
TOBIAS MILLER, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Albert M. Yuzzolino, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Ullo, Ruebsamen & Yuzzolino, attorneys, and as such am one of the attorneys for the plaintiff, Secondo Guasti, in the above entitled action.

In or about the month of July, 1910, my firm was retained by Mr. Secondo Guasti of Los Angeles, California, to commence an action on a judgment obtained by him and Juan A. Bernard against Tobias Miller, in the City Court of the City of New York, on the 16th day of April, 1895, for $1,085.40.

I thereupon examined the judgment-roll and the Sheriff's records in this matter and found that the judgment-roll which consisted of a summons, complaint and judgment, together with an affidavit of service of the summons and complaint, was filed in the office of the Clerk of said Court, on April 16, 1895. The sum-
21 mons and complaint contained on the back thereof, the names of "Douglas & Minton" clearly printed, as the attorneys for the plaintiffs in that action, and also their office and post office address as "314 Broadway, New York City."

The said judgment is also filed in the office of the Clerk of the County of New York, on April 16, 1895. Upon being retained in this matter I received, among other papers, from my client, a letter-head of the Golden Gate Fruit Co., which states that Tobias Miller is the proprietor of said business; the said letter-head is hereto annexed as "Exhibit A."

Before commencing the action, therefore, I procured financial reports of a mercantile agency on Tobias Miller and the Golden Gate Fruit Co. From these reports it appears, among other things, that Tobias Miller is the proprietor of the Golden Gate Fruit Co.,

which business was started in March, 1900, by Julia Miller, the wife of Tobias Miller, together with Edward, L. Watkins, and that at that time they represented as having a small fruit farm near San Gabriel, California, and that in March, 1904, Tobias Miller, the husband of said Julia Miller, stated that their headquarters were in Los Angeles, California, and referred there for all information. This report also states that "Miller was at one time in the retail liquor business some years ago;" that he failed in this business, and that he received "his discharge in bankruptcy in May, 1903."

This report which I received in my office about the 15th day of August, 1910, was the first intimation that I or my firm had received, that Mr. Miller had gone through bankruptcy. I immediately wrote to Mr. Guasti, sending him this information, and
22 asking him whether or not he had any knowledge of these proceedings, to which I received a letter in reply, stating that he had never known or received any notice of Mr. Miller having gone into bankruptcy. I thereupon examined the bankruptcy records in the office of the United States District Court for the Southern District of New York, and found that a petition in voluntary bankruptcy was made by said Tobias Miller, and filed the 26th day of December, 1902, and that he received his discharge in bankruptcy on the 9th day of May, 1903. The schedules filed by Tobias Miller in said bankruptcy proceedings contain the judgment herein mentioned as a debt and is described as follows:

Name of creditor.	Residence & occupation.	Nature and consideration of debt, etc.
Guasti & Bernard.	Unknown, California.	Goods sold and delivered—Judgment was rendered in the City Court of the City of New York, April 16, 1895.

I also examined the records in the office of the Clerk of the County of New York where are filed the certificates for the use of firm name; I there found on file as of September 10, 1900, a certificate executed by Tobias Miller, as attorney for Julia Miller his wife, and by Ed. L. Watkins of San Gabriel, California, certifying
23 that they are engaged in the business of fruit and juices under the name or style of Golden Gate Fruit Co.; copy of said certificate is hereto annexed as "Exhibit B."

There also appears in said office on file as of July 12, 1904, a second similar certificate executed by Tobias Miller, certifying that he is the sole person conducting the business under the name of said "Golden Gate Fruit Co.": copy of said certificate is hereto annexed as "Exhibit C."

ALBERT M. YUZZOLINO.

Sworn to before me, this 18th day of February, 1911.

HAROLD R. LHOWE,
Notary Public, New York Co.

Affidavit of Elmer Rodrigo Read in Opposition to Motion.

Supreme Court, New York County.

SECONDO GUASTI et al., Plaintiffs,
against
TOBIAS MILLER, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Elmer Rodrigo, being duly sworn, deposes and says:

I am an attorney at law and, during the year 1895 and
24 also during the years 1902 and 1903, I was and still am with the firm of Douglas & Minton, attorneys, with offices at 290 Broadway, Borough of Manhattan, New York City.

In the year 1895, the said firm of Douglas & Minton was retained by Secondo Guasti and Juan A. Bernard, composing the firm of Guasti & Bernard, to recover on a claim against Tobias Miller, which claim was based on an acceptance of a bill of exchange.

An action was thereupon commenced by the said Secondo Guasti and Juan A. Bernard against Tobias Miller in the City Court of the City of New York, by the said Douglas & Minton as attorneys of record, and a judgment was thereafter obtained in said action in favor of plaintiffs and against defendant on the 16th day of April, 1895, for the sum of $1,085.40.

The judgment-roll in said action was thereafter duly entered and docketed in the office of the Clerk of the City Court of the City of New York, and a transcript thereof was filed in the office of the Clerk of the County of New York, on the said 16th day of April, 1895, and execution was on the said day issued upon said judgment to the Sheriff of the County of New York.

That, from the records in the office of the said firm of Douglas & Minton, it appeared that the address of the said Secondo Guasti and Juan A. Bernard was Los Angeles, California; and the said records showing said address were still in the possession of the said firm during the years 1902 and 1903.

That so far as deponent can remember, or said records show, no notice was ever at any time received by the said firm of Douglas &
Minton as attorneys for Secondo Guasti and Juan A. Ber-
25 nard, or for either of them, of any bankruptcy proceedings taken by or against the said Tobias Miller, and no notice of any application for a discharge in bankruptcy by or on behalf of the said Tobias Miller was ever served upon said firm or received by them as such attorneys; that no inquiry was made by or on behalf of the defendant Tobias Miller of the said firm of Douglas & Minton for the address of Secondo Guasti or Juan A. Bernard; and if any such inquiry had been made with a view of sending them notice of any bankruptcy proceedings of Tobias Miller, the information at

our disposal concerning the addre - of our said clients would have been given.

ELMER RODRIGO.

Sworn to before me this 29th day of November, 1910.

SAMUEL J. WALSH,
Notary Public, No. 16, New York County, N. Y.

26 *Affidavit of Harold R. Lhowe Read in Opposition to Motion.*

Supreme Court, New York County.

SECONDO GUASTI and JUAN A. BERNARD, Plaintiffs,
against
TOBIAS MILLER, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Harold R. Lhowe, being duly sworn, deposes and says:

I am an attorney at law in the office of Ullo, Reubsamen & Yuzzolino, attorneys for the plaintiffs in the above case. I have examined the city directories of the City of New York for the years commencing from 1895 to 1903, both inclusive, and in all of said directories there appear the names of Douglas & Minton, attorneys, with their address which is herein given as No. 314 Broadway, New York City, up to the year 1897, and from and after the year 1898 to the year 1903, it is given as 290 Broadway, New York City.

On information and belief, the names of the said Douglas & Minton, attorneys, with their address, also appeared in the telephone directory of the City of New York continuously for the last twenty years.

The sources of deponent's knowledge as to the last part of this affidavit is from the fact that deponent, as attorney
27 practicing in the City of New York, knows that the said firm of Douglas & Minton is one of the largest and best known firms of attorneys in the City of New York, and that they have maintained a large office for their practice as such, for upward of thirty years; and also the statement made to deponent by Elmer Rodrigo who has been connected with the said firm of Douglas & Minton for the last thirty years, to the effect that they have always and continuously had a telephone in their office for the last thirty years, and that their name appeared in the telephone directories of the City of New York.

HAROLD R. LHOWE.

Sworn to before me this 18th day of February, 1911.

PETER GAMBARO,
Notary Public, New York Co.

28 *Affidavit of Ernest C. Romano, Read in Opposition to Motion.*

Supreme Court, New York County.

SECONDO GUASTI and JUAN A. BERNARD, Plaintiffs,
against
TOBIAS MILLER, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Ernest C. Romano, being duly sworn, deposes and says: I have been connected with the business of wine-producers and growers for upward of seven years last past, in the cities of Los Angeles, California; Chicago, Illinois; and New York, N. Y., and am familiar with the wine-producing and fruit-juice business, and with the conditions of the trade in general throughout the United States.

It is well known in the trade that there are two districts for wine producers and growers in California, to wit: the Northern and the Southern districts; the center of the Northern District is San Francisco, and of the Southern District, is Los Angeles. The latter city, up to two or three years ago, having been the only important wine producers' center of Southern California.

I have been in Los Anglese, California, and also in San Gabriel, California, and I know that San Gabriel is a little over five miles from Los Angeles. It is well known in the trade that Secondo Guasti is one of the oldest and most important wine producers
29 and growers of Los Angeles, California, and that he has been in that business and at that same address for upwards of 25 years.

In the beginning of the year 1905, I was employed as Chief Clerk in the office of Mr. Secondo Guasti at Los Angeles, California, and as such it was one of my duties to keep track of the accounts in the books and I had free access to all the books and records. I saw, then, that the Golden Gate Fruit Company, with offices in New York and San Gabriel, California, were in business dealings with the said Mr. Guasti and that they carried a regular account in the books.

When I was in Los Angeles, the Golden Gate Fruit Company was in the business of dealers in and manufacturers of wines and brandies, which is the same business as Mr. Guasti's, and its account, as it appeared in said books, was made up of purchases of wines and brandies by them.

During my stay in Los Angeles, I very frequently saw Mr. Ed. L. Watkins in the office of Mr. Guasti, coming there on business in behalf of the said Golden Gate Fruit Company.

The correspondence of the Golden Gate Fruit Co. with Mr. Guasti during the time that I was in his employ, as above stated, was on letterheads of which Exhibit A hereto annexed is a fac-simile.

I am familiar with the publication known as the "American Wine

Press," which is the organ of the American Wine Growers Association, comprising all the wine producers in the United States, and the said "American Wine Press," is the official publication of the trade; and I get the paper regularly.

ERNEST C. ROMANO.

Sworn to before me this 21st day of February, 1911.

HAROLD R. LHOWE,
Notary Public, New York Co.

30 *Affidavit of L. J. Vance, Read in Opposition to Motion.*

Supreme Court, New York County.

SECONDO GUASTI et al., Plaintiffs,
against
TOBIAS MILLER, Defendant.

STATE OF NEW YORK,
County of New York, ss:

L. J. Vance, being duly sworn, deposes and says: I am the editor of the publication known as the "American Wine Press" of the City of New York; the said publication is devoted to the interest of the American wine industry and is the official publication of the American Wine Growers Association, which comprises all of the leading wine growers or wine makers of the United States.

The said "American Wine Press" is published in the City of New York and has a circulation of several thousand throughout the United States; among its branch offices, one at San Francisco, California, and among these correspondents is one at Los Angeles, California. These were also maintained during the years 1902 and 1903.

The said paper is a monthly publication and has been continuously in existence since the year 1897.

31 In the year 1898, Mr. Secondo Guasti of Los Angeles, California, inserted his advertisement in the "American Wine Press," taking up a space of one-fourth of a page, and which is in words as follows:

"Secondo Guasti,

(Picture of Plant.)

Grower and Distiller of
California Wines and Brandies,
Los Angeles, California.
Producer of Sweet Wines."

The said advertisement continued to appear in the said "American Wine Press" without interruption in all of its issues up to the month of July, 1903.

I am familiar with the wine dealers and wine producers in this city, and was familiar with them in the years 1902 and 1903, and I know that during such period Secondo Guasti was well known in the trade as one of the leading wine producers and wine growers of the country; and it was also well known during that period in the trade that he was from the Southern section of California and located at Los Angeles.

It is known in the wine trade that, the City of Los Angeles is the center of the wine producing and wine growing industry of Southern California, and in the years 1901, 1902 and 1903, it was the only city in that section where large producers were established.

I have known of Mr. Tobias Miller for several years and know him to be in the wine and brandy business and connected with the Golden Gate Fruit Co., which concern is in the same business.

32 I know that during the years 1902 and 1903 copies of the "American Wine Press" were delivered to Golden Gate Fruit Co.

L. J. VANCE.

Sworn to before me this 17th day of February, 1911.

HAROLD R. LHOWE,
Notary Public, New York Co.

Plaintiffs' Exhibit A and attached to the original papers was a letterhead of the defendant showing the following:

Golden Gate Fruit Co.,

E. L. Watkins, Mangr.,
T. Miller, Prop.

Pictures of
Entrance to Office. Wine Cellar. Wine Groves.

New York Office,
375 West Broadway.

Proprietor of
Pomona Winery,
Fruit Distilleries,
Nos. 252 and 427, 1st Dist. Cal.

Alhambra, San Gabriel and Dolgeville, Cal.

33 *Certificate of Julia Miller, Read in Opposition to Motion.*

STATE OF NEW YORK,
County of New York, ss:

I, Tobias Miller, attorney in fact for Julia Miller, do hereby certify that the persons named below are conducting or transacting the business of dealing in fruit and juices at 481 and 483 Washington

Street, in the County of New York and State of New York, under the name of "The Golden Gate Fruit Company," and that the true or real names of the persons conducting or transacting such business, with post-office addresses of said persons, are as follows:

Name.	Post office address.
Julia Miller,	689 East 139th Street, New York City, New York.
E. L. Watkins,	San Gabriel, California.

Dated, New York, Sept. 10th, 1900.

——— ———.

COUNTY OF NEW YORK, *ss:*

On this, the tenth day of September, Nineteen hundred, before me personally came Tobias Miller, attorney in fact, for Julia Miller, of the City, County and State of New York, to me known, and known to me to be the individual described in and who executed the foregoing certificate and who acknowledged to me that he executed the same.

MADOC EPSTEIN,
Notary Public, New York County, M. J. D.

(Certified.)

34 *Certificate of Tobias Miller, Read in Opposition to Motion.*

This is to certify that the undersigned, Tobias Miller, is doing business in the City of New York, Borough of Manhattan, at No. 347 West Broadway, said city, under the firm name and style of "Golden Gate Fruit Company," and files this certificate in pursuance of and in conformity with the Chapter 216 of Laws of 1900, and that the post office address of said Tobias Miller is 347 West Broadway, City of New York, Borough of Manhattan.

TOBIAS MILLER.

STATE OF NEW YORK,
County of New York, ss:

On this 12th day of July, 1904, before me personally appeared Tobias Miller, to me known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

ESTELLE LEVIN,
Com. of Deeds, N. Y. Co., M. J. D.

(Certified.)

35 *Affidavit of Tobias Miller, Read in Support of Motion.*

Supreme Court, New York County.

SECONDO GUASTI et al., Plaintiffs,
against
TOBIAS MILLER, Defendant.

CITY AND COUNTY OF NEW YORK, *ss.:*

Tobias Miller, being duly sworn, says:

That I am the defendant above named. That I have read the affidavits submitted by the plaintiffs in opposition to the motion herein, and say, in reply thereto:

I was in the retail liquor business in the City of New York down to and including the year 1894. During that year I failed in business. That thereafter I went to work as an employee in various businesses.

That in the year 1898 the Bankruptcy Act was passed.

That in the year 1902, eight years after I failed in business, I filed a petition in bankruptcy in the Southern District of New York.

That I was discharged from my debts and obligations on the 9th day of May, 1903.

36 That at the time that I filed my petition in bankruptcy, I had absolutely no assets excepting wearing apparel, which was exempt under the law. That no assets were turned over to the Trustee in bankruptcy, and that no dividend was paid to any creditor.

That some opposition was presented to my discharge by one of my creditors, but the Court overruled such objection, and I was finally discharged as above stated.

That among the creditors scheduled in my schedules were Guasti and Bernard for the amount of a judgment which they then had recovered against me on April 16, 1895. That the filing of my petition and the notice to creditors was published in the New York Times, pursuant to the Bankruptcy Act, as appears by the affidavit of William L. Morck, hereto attached.

That eight years have elapsed between the date I filed my schedules and my failure in business; during that time I had not done any business and had no connection with any of my creditors. That during those eight years, I was not in business. That all of my books, bills, papers, and memoranda connected with my said business had been destroyed or lost. That when I made up my schedules, I endeavored to remember who my creditors were and how much I owed. That I had entirely forgotten the said Guasti and Bernard, but my attorneys had a search made for such judgments as there appeared on record, and by this method ascertained that they had recovered a judgment. That the said search did not reveal the address of the plaintiffs, and I did not know it and so informed my attorney, excepting that I remembered that they were located in California, but I could not remember the place, and therefore their

address was written as unknown, other than the State of California.

37 That in the year 1900, my wife embarked in an enterprise known as the Golden Gate Fruit Company with one Edward L. Watkins, who resided at Alhambra, California, and the said Watkins conducted the business from Alhambra, California, and at that time and down to 1904, the Golden Gate Fruit Company did absolutely no business with the said Guasti and Bernard, to my knowledge. That down to the year 1907 I did not know the residence or address of the said Guasti and Bernard. That I had entirely forgotten it, if I ever did know it. That I did very little business with them prior to my failure in 1895; prior to that time, viz., 1895, I purchased some merchandise from them in the City of New York, and it may be, as is alleged by the said Guasti in his affidavit at folio 11 that I accepted a draft drawn on me in 1894, but the original indebtedness was for merchandise purchased in New York City.

That the first time that I had met either Guasti or Bernard was in the year 1907, four years after my discharge, when I was in Los Angeles, California. Guasti then called my attention to the fact that the firm of Guasti and Bernard were a creditor of mine, and that I owed them an old indebtedness. I then told him, as is alleged in his affidavit, "that they should let me alone for the present as I have just got on my feet again, and when I get settled I will pay," but I also told him that I had been discharged in bankruptcy from the indebtedness, and that I would not sign any notes, but that it would be a matter of honor and a moral obligation. The fact that I told him that I just got on my feet again is proof that I told him how I got on my feet again. It is true that since 1907, which

38 was four years after my discharge in bankruptcy, I have traded with the Italian Vineyard Company, of which concern Guasti is the president, but I had had no business dealings with them nor written any letters to them between 1895 and 1903.

That before the year 1907, I never saw either of the plaintiffs or any individual connected with the plaintiffs, either in California or in the City of New York.

I have read the affidavit of L. J. Vance, and I have never, either individually or in connection with the Golden Gate Fruit Company, subscribed to the paper known as the "American Wine Press," and that if such paper was ever delivered to the Golden Gate Fruit Company or to any other of the parties mentioned in the affidavit, I was not aware of it and have never seen the advertisement of the plaintiffs alleged to have been published in said "American Wine Press" periodical.

I have read the affidavit of Ernest Romano, and it is true that in 1905, the Golden Gate Fruit Company, with which I am connected, purchased goods from the Italian Vineyard Company, but this was two years after my discharge in bankruptcy.

That in 1902, when I signed and swore to the schedules in bankruptcy, wherein I stated that the address of Guasti and Bernard was unknown to me, other than California, that statement was true, and

I did not know at what place in California the said Guasti and Bernard resided or carried on business.

That I had no intention of deceiving the Bankrupcty Court or to falsely state that I did not know the address of the said creditor, and could have no object in not stating the exact address if it
39 had been within my knowledge, because I had no assets and there was no distribution or any dividend to any creditor, and I had complied with all the requirements and provisions of the Bankruptcy Act, as is evidenced by my subsequent discharge.

TOBIAS MILLER.

Sworn to before me this 14th day of March, 1911.

W. L. MORCK.
Commissioner of Deeds, New York City.

Affidavit of William L. Morck, Read in Support of Motion.

New York Supreme Court, New York County.

SECONDO GUASTI & ANO., Plaintiffs,
against
TOBIAS MILLER, Defendant.

COUNTY OF NEW YORK, *ss:*

William L. Morck, being duly sworn, deposes and says: That he is a clerk in the office of Jesse S. Epstein, attorney for the defendant herein.

40 That deponent has examined the records on file in the office of the Clerk of the United States District Court for the Southern District of New York, and deponent finds, upon such examination, that the defendant herein filed his petition in bankruptcy and his schedule in triplicate in the said office of the Clerk of the United States District Court for the Southern District of New York, on December 26th, 1902.

That the said schedules on file disclose that the defendant had eleven creditors, none of which had any security, and that their total claim amounted to Six thousand, Seven hundred and Eighty-three and 15/100 ($6,783.15) Dollars, and that the bankrupt was possessed of no assets other than wearing apparel to the amount of One Hundred and Fifty ($150) Dollars, which the bankrupt claimed to be exempt under the Laws of the State of New York.

That the said schedules show that the bankrupt was possessed of no books or papers of any kind.

The record further shows that but two creditors filed claims, and that notwithstanding the objection filed by one of the defendant's creditors, the Hon. William Allen, designated by the United States District Court as Special Master to hear and report on the specifications, reported in the bankrupt's favor and recommended his discharge, and which report was subsequently confirmed and the de-

fendant discharged of his debts, and a decree to that effect entered in the office of the Clerk of the United States District Court.

That in the said schedules, under Schedule A-3 of unsecured creditors, the debt of Guasti and Bernard was scheduled by the bankrupt, and their address stated by the bankrupt to be unknown, other than California.

41 That from the record on file in the said office, it further appears that the Referee in charge of the defendant's bankruptcy proceedings, caused a notice of the first meeting of creditors to be published in the "New York Times," on January 3rd, 1903, and an affidavit of such publication is on file in the said Court made by Theodore L. Peverelly, principal clerk of the "Times," and it likewise appears that the bankrupt's petition for discharge was duly published on February 17th, 1903, in the "New York Times," and an affidavit of such publication is now on file in said Court.

That it further appears from the said record on file in the said United States District Court, that there were no assets, no Trustee elected and no dividend declared.

That in the bankrupt's petition is stated on oath that at the time of the filing of the said petition, the bankrupt had no occupation, and it further appears from his schedules that all of the bankrupt's debts of which he was discharged, were incurred a great number of years prior to the filing of his petition.

WM. L. MORCK.

Sworn to before me this 14th day of March, 1911.

V. BROTHERS,
Commissioner of Deeds, New York City.

42 *Opinion by Newberger, J.*

Guasti et al., vs. Miller. The defendant's affidavits clearly show that plaintiff's judgment was not duly scheduled as required by the Bankruptcy Act; therefore this motion must be denied (see Columbia Bank vs. Birkett, 174 N. Y., 112; Graber vs. Gault, 103 App. Div., 511).

Settle order on notice.

Notice of Appeal to the Court of Appeals.

Supreme Court, New York County.

SECONDO GUASTI and JUAN A. BERNARD, Respondents,
against
TOBIAS MILLER, Appellant.

SIRS: Please take notice that the defendant, Tobias Miller, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Depart-

ment, made in the above entitled action and entered in the office of the Clerk of said Appellate Division on the 28th day of
43 April, 1911, affirming an order of the Supreme Court, entered in the office of the Clerk of the County of New York on the 20th day of March, 1911, denying the defendant's motion to cancel a judgment pursuant to Section 1268 of the Code of Civil Procedure, and the defendant appeals from each and every part of the said order.

Dated, New York, May 29, 1911.

Yours, etc.,

JESSE S. EPSTEIN,
Attorney for Appellant.

Office and P. O. Address, 149 Broadway, Borough of Manhattan, New York City.

To Messrs. Ullo, Ruebsamen & Yuzzolino, Attorneys for Respondents.

To William F. Schneider, Esq., Clerk.

44 *Order of Appellate Division.*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 28th day of April, 1911.

Present: Hon. George L. Ingraham, Presiding Justice.
" Chester B. McLaughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

Affirmance of Order No. 1607.

SECONDO GUASTI and JUAN A. BERNARD, Respondents,
against
TOBIAS MILLER, Appellant.

An appeal having been taken to this Court by the defendant from an order of the Supreme Court entered on the 20th day of March, 1911, and said appeal having been argued by Mr. Jesse S. Epstein, of counsel for the appellant, and by Mr. Albert M. Yuzzolino, of counsel for the respondents; and due deliberation having been had thereon, it is hereby ordered that the order so appealed from be and the same is hereby affirmed with $10 costs and disbursements.

Enter,

G. L. I.

45 *Affidavit of No Opinion.*

CITY AND COUNTY OF NEW YORK, *ss:*

Jesse S. Epstein, being duly sworn, deposes and says that he is the attorney for the defendant-appellant herein.

That no opinion was rendered by the Appellate Division on the

affirmance of the order of the Special Term from which this appeal is taken, except McLaughlin J. dissented.

(Signed) JESSE S. EPSTEIN.

Sworn to before me this 29th day of August, 1911.

W. L. MORCK,
Commissioner of Deeds, New York City.

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated and agreed that the foregoing consists of true and correct copies of the Notice of Appeal, the order appealed from and all the papers used in the Court below in making the order appealed from and the whole thereof, now on file in the office of the Clerk of the County of New York, and that certification thereof, pursuant to Section 1353 of the Code be and the same is hereby waived.

Dated, New York, March 22, 1911.

JESSE S. EPSTEIN,
Attorney for Appellant.
ULLO, RUEBSAMEN & YUZZOLINO,
Attorneys for Respondents.

46 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals Held at the Capitol in the City of Albany, on the 24th Day of October, in the Year of Our Lord One Thousand Nine Hundred and Eleven, before the Judges of said Court.

Witness the Hon. Edgar M. Cullen, Chief Judge Presiding.

R. M. BARBER, *Clerk.*

Remittitur October 25th, 1911.

47 SECONDO GUASTI and Another, Respondents,
against
TOBIAS MILLER, Appellant.

Be it remembered, that on the 22nd day of September, in the year of our Lord one thousand nine hundred and eleven, Tobias Miller, the appellant in this proceeding came here into the Court of Appeals by Jesse S. Epstein, his attorney and filed in the said court a notice of Appeal, and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Secondo Guasti and another the respondents in said proceedings afterwards appeared in said court of Appeals by Ullo, Ruebsamen & Yuzzolino, their attorneys.

Which said notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals, this cause having been submitted by counsel for the respective parties and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein, be and the same hereby is affirmed with costs, and it was also further ordered that the record aforesaid and the proceedings in this Court be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed with costs as aforesaid.

48 And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, be they given in the premises, are by the said court of appeals remitted into the Supreme Court of the State of New York, before the Justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *October 25th*, 1911.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

49 At a Special Term Part II of the New York Supreme Court held in and for the County of New York, at the County Court House in the Borough of Manhattan, City and State of New York, on the 28 day of November 1911.

Present: Hon. —— ——, Justice.

SECONDO GUASTI and JUAN A. BERNARD, Plaintiff-,
against
TOBIAS MILLER, Defendant.

The above named defendant having appealed to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, First Department filed in the office of the Clerk of the Appellate Division on the 28th day of April 1911, affirming an order of the Supreme Court, entered and filed in the office of the Clerk of the County of New York, on the 20th day of March 1911 denying the defendants' motion to cancel a judgment obtained by the above named plaintiffs against the above named defendant on April 16, 1895; and the said appeal having been duly argued at the Court of Appeals, and after due deliberation thereon,

the Court of Appeals, having ordered and adjudged that the said order so appealed from as aforesaid be affirmed with costs and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to the law.

50 Now, on reading and filing the remitt-ur filed in the Court of Appeals therein and the annexed consent of the attorney for the defendant, and upon motion of Ullo, Ruebsamen & Yuzzolino, attorneys for the Plaintiff.

It is ordered that the said order of the Court of Appeals be and the same hereby is made the order of this Court,

And it is further ordered that this order be and the same hereby is entered nunc pro tunc as of October 27, 1911.

Enter,

SAM'L SEABURY, *J. S. C.*

The form of the foregoing order is hereby approved.
N. Y. Nov. 28th, 1911.

JESSE S. EPSTEIN,
Attorney for the Defendant.

51 [Endorsed:] New York Supreme Court, New York County. Secondo Guasti et al., Plaintiff-, vs. Tobias Miller, Defendant. Copy. Order. Ullo, Ruebsamen & Yuzzolino, Attorneys for Plaintiff-, Office and P. O. Address, No. 11 Broadway, Bowling Green Building, Borough of Manhattan, New York City.

52 SECONDO GUASTI and JUAN A. BERNARD, Respondents,
v.
TOBIAS MILLER, Appellant.

(Decided October 24, 1911.)

Appeal from an Order of the Appellate Division, First Department, Affirming an Order of the Special Term which Denied a Motion on Behalf of the Defendant, Tobias Miller, to Cancel a Judgment Obtained by the Plaintiffs against Him After a Discharge in Bankruptcy.

William C. Rosenberg for appellant.
Albert M. Yuzzolino for repsondents.

HAIGHT, *J.:*

The judgment sought to be canceled was docketed in the office of the clerk of the county of New York on April 16, 1895, and the discharge in bankruptcy was obtained May 9th, 1903. The defendant's schedule, with his petition in bankruptcy, was filed September 26th, 1902, and set forth the plaintiff's judgment in the following words:

"Name of creditor.	Residence and occupation.	Nature and consideration of debt, etc.
Guasti & Bernard,	Unknown, California.	Goods sold and delivered. * * * Judgment was rendin the City Court of the City of New York, April 16, 1895."

The defendant applied to the Special Term for an order canceling the judgment under section 1268 of the Code of Civil Procedure, which has been repealed and is now embraced in section 150 of the Debtor and Creditor Law (Consol. Laws, ch. 12), and provides as follows: "At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it, or filing a transcript thereof, for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record." etc. The Bankruptcy Act, section 7, among other things, provides that the bankrupt shall file a schedule of his property, and also give "a list of creditors showing their residences if known, if unknown, that fact to be stated." The Special Term denied the defendant's application upon the ground, as stated by him in his memoranda filed, that the affidavits clearly show that the plaintiffs' judgment was not duly scheduled, as required by the Bankruptcy Act, basing his decision upon Columbia Bank v. Birkett (174 N. Y. 112) and Graber v. Gault (103 App. Div. 511). That order has been affirmed in the Appellate Division.

53

The preliminary objection has now been raised, to the effect that the application was of an order in the action, and for that reason it is not appealable to this court. The application is based upon the result of a proceeding in bankruptcy that has been conducted in the Federal court, and the application may be made not only by the bankrupt himself, but by any person who has succeeded to the rights of the bankrupt in the property affected thereby. (Graber v. Gault, 103 App. Div. 511.) We are of opinion that it is a special proceeding.

In considering the case upon the merits, we find that the schedule states the residence and occupation of the plaintiffs as Unknown, California; and stating the nature and consideration of the debt, it is said in the schedule to be for goods sold and delivered. The affidavits read upon the motion show that the plaintiffs were wine merchants and producers, doing business at Los Angeles, California,

and had been engaged in that business for upwards of twenty-five years past; and that the claim on which the judgment was entered against the defendant was based on the acceptance of a draft drawn on the defendant by the plaintiffs, containing their post office address as Los Angeles, California, which was accepted by him and was given in payment of a carload of wine purchased by said Miller from the plaintiffs in Los Angeles, California. There were additional facts made to appear by the affidavits, which we do not deem it necessary to here refer to, for we deem them sufficient to sustain the finding of the Special Term that the defendant had actual notice of the plaintiffs' residence and post office address. It also is made to appear that the plaintiffs knew nothing of the proceedings in bankruptcy, or that the defendant had instituted such proceedings, until August 23, 1910, long after the discharge had been granted by the Bankruptcy Court. We are, therefore, of the opinion that the claim of the plaintiffs was not properly scheduled by the defendant, and that consequently the Special Term properly denied the defendant's application. (Columbia Bank v. Birkett, 174 N. Y. 112; affirmed, 195 U. S. 345.)

The order should be affirmed, with costs.

Cullen, Ch. J., Werner, Willard Bartlett, Hiscock and Chase, JJ., concur; Vann, J., absent.

Order affirmed.

54 Know all men by these Presents: That we, Tobias Miller, of 375 W. Broadway, New York, N. Y., as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, having an office and usual place of business at No. 49 Cedar Street, City of New York, as surety, are held and firmly bound unto Secondo Guasti and Juan A. Bernard, in the full and just sum of Two Hundred and Fifty ($250.) Dollars—to be paid to the said Secondo Guasti and Juan A. Bernard; to which payment well and truly to be made the said principal binds himself, his heirs, executors, administrators and assigns, and the said Surety Company binds itself, its successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of October, in the year of our Lord, one thousand nine hundred and eleven.

Whereas, lately at a plea in the Court of Appeals for the State of New York, held at Albany, New York, on the 24th day of October, 1911, in a suit pending in the Supreme Court of the State of New York, New York County, between the above named Secondo Guasti and Juan A. Bernard as plaintiffs, and against Tobias Miller, as defendant, an order was made in the Court of Appeals on the 24th day of October, 1911, and filed in the office of the County Clerk of New York County, on October 27th, 1911 affirming an order of the Appellate Division, First Department, which affirmed an order of the Special Term of the Supreme Court, New York County, which denied an application to cancel the judgment, and a citation directed

to said Secondo Guasti and Juan A. Bernard directing and
55 admonishing them to be heard and appear at the Supreme Court of the United States at Washington, D. C. thirty days from date thereof, now the condition of the above obligation is such that if the said Tobias Miller shall prosecute said writ of error to effect and answer, all costs, if they fail to make the said plea good then the above obligation to be void otherwise to remain in full force and virtue.

TOBIAS MILLER.
[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN,
Manager.

Attest:

E. G. BABCOCK.
Attorney-in-Fact.

STATE OF NEW YORK,
County of New York, ss:

On this 31st day of October 1911 before me personally came Tobias Miller to me known and known to me to be — individual described in and who executed the foregoing instrument and who acknowledged to me that he executed the same for the purpose therein set forth.

W. L. MORCK,
Com'r of Deeds, New York City.

Approved November 2nd, 1911.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

56 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

Fidelity, Judicial, Casualty, Contract.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Tobias Miller, as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has com-

plied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Tobias Miller is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with E. G. Babcock, and knows him to be Attorney-in-fact of said Company; and that the signature of said E. G. Babcock subscribed to said bond is the genuine handwriting of said E. G. Babcock and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 31 day of Oct. 1911.

C. D. MARSAC,
Notary Public, New York County.

57 [Endorsed:] Tobias Miller, Principal, and United States Fidelity and Guaranty Company. Bond.

58 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Secondo Guasti and Juan A. Bernard, plaintiffs, and Tobias Miller, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or
59 of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said de-

fendant, Tobias Miller, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of November, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

60 [Endorsed:] Received Dec. 2nd, 1911. Wm. F. Schneider, Clerk.

61 UNITED STATES OF AMERICA, *ss:*

To Secondo Guasti and Juan A. Bernard, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York, wherein Tobias Miller is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this second day of November, in the year of our Lord one thousand nine hundred and eleven.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

62 [Endorsed:] Due service of a copy of the within citation is hereby admitted this 3rd day of November, 1911. Ullo, Ruebsamen & Yuzzolino, att'ys for Secondo Guasti & Juan A. Bernard.

63 To the Honorable Edward D. White, Chief Justice of the United States, and to the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, and to the other Justices of said Honorable Court, and to the Honorable the Supreme Court of the United States:

The petition of Tobias Miller, who resides in the City, County and State of New York, respectfully shows:

Heretofore and on the 16th day of April, 1895, a judgment was obtained against your petitioner by one Secondo Guasti and Juan A. Bernard in an action in the City Court of the City of New York, wherein the said Secondo Guasti and Juan A. Bernard were plaintiffs and your petitioner was defendant, for the sum of $1085.40, which judgment was thereafter duly docketed in the office of the Clerk of the County of New York on the 16th day of April 1895.

That said judgment sought to be cancelled was not a debt embraced within Section 17 of the Acts of Congress relating to Bankruptcy providing for the excepting of certain debts from the operation of a discharge in bankruptcy, but was obtained in an action upon an accepted draft for goods sold and delivered.

That thereafter, and on the 26th day of December 1902, your petitioner duly filed in the office of the Clerk of the United States District Court for the Southern District of New York, a petition in voluntary bankruptcy, and on that day your petitioner was duly adjudicated a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy in force and effect

64 on that day.

That thereafter such proceedings were duly had that on the 9th day of May 1903 there was duly entered and filed in said District Court of the United States for the Southern District of New York a decree discharging your petitioner from all debts and claims which were made provable by said Acts against your petitioner's estate, and which existed against your petitioner on the 26th day of December 1902, excepting such debts as were and are by law excepted from the operation of a discharge in bankruptcy.

That simultaneously with the filing of said petition in voluntary bankruptcy, your petitioner prepared and made oath to and filed, in triplicate, in Court, with his said petition, a schedule of his property showing the amount and kind of property, the location thereof and money value in detail, and a list of his creditors showing their residences, where known, and where unknown stating that fact, together with the amounts due each of them, the consideration thereof and the security held by them, if any.

That at that time, your petitioner had no books of account or records of any kind, nature or description from which the names or addresses of his creditors could be ascertained and was compelled to make up such list of creditors from memory, and were it not for the fact that a judgment search of the office of the Clerk of the County of New York disclosed the fact that said Secondo Guasti and Juan A. Bernard had obtained judgment, your petitioner would not have

inserted their name in said schedules for the reason that he had absolutely forgotten the fact that they were creditors.

65 That when said judgment search disclosed the name- of Guasti and Bernard as having obtained a judgment, petitioner did not know their address and was wholly unaware as to the whereabouts of said Guasti and Bernard other than the fact that they were located in the State of California. That your petitioner had no business or other relations whatsoever with said Guasti and Bernard since early in the year 1895, and your petitioner had been out of business for that period of time and was wholly ignorant of the residence or other address of said Guasti and Bernard, other than as aforesaid and so stated in the said list filed by him with his petition in bankruptcy, as aforesaid.

That on or about the 16th day of February 1911, your petitioner applied to the Supreme Court of the State of New York for an order cancelling said judgment so obtained against your petitioner by said Secondo Guasti and Juan A. Bernard, of record upon the ground that the said judgment and the debt for which it was obtained, was discharged in bankruptcy and pursuant to the Statute in such cases made and provided, and which said application was opposed by said Secondo Guasti and Juan A. Bernard, and on the 20th day of March 1911, an order was made by said Supreme Court of the State of New York denying the said application, and from which order an appeal was taken to the Appellate Division of the Supreme Court for the First Judicial Department, where said order was on the 28th day of April 1911 affirmed with $10. costs and disbursements, Justice McLaughlin of said Court dissenting from such determination; and that thereafter an appeal was taken from said order of said Appellate Division to the Court of Appeals of the State of New York where said order was on the 24th day of October 1911 affirmed by

66 said Court of Appeals in an opinion by Mr. Justice Haight, a copy of which is hereto annexed, marked "Exhibit A" and made a part hereof with the same force and effect as if fully set forth herein, and the record on said appeal has been remitted by said Court of Appeals to the Clerk of the Supreme Court of the County of New York, where, by the laws of the State of New York, said record is required to be sent by said Appellate Court.

That the grounds upon which said appeal has been decided are as follows: "That from the affidavits in opposition to your petitioner's motion, there was evidence from which the Supreme Court of the State of New York could have found that your petitioner knew the address of said Secondo Guasti and Juan A. Bernard at the time he filed his petition and schedules in bankruptcy."

Upon the application in the Supreme Court and in the Appellate Division and in the Court of Appeals, no contention was made that your petitioner had actual knowledge of the address of said Guasti and Bernard, and such contention was not raised by said Guasti and Bernard whose only contention throughout was that the address of said Guasti and Bernard could have been obtained by your petitioner by the exercise of reasonable diligence, whereas the contention of your petitioner was and is, that if your petitioner made a

truthful statement in his schedules to the effect that said address was unknown, that the debt was duly scheduled and was discharged by the discharge in bankruptcy, and that your petitioner was
67 entitled to a cancellation of said judgment upon the ground that it was discharged in bankruptcy.

That said decisions of said Supreme Court of the State of New York and said Appellate Division of said Supreme Court and said Court of Appeals and of each of them denied to your petitioner a title, right, privilege and immunity held by your petitioner under the Constitution and statutes of the United States.

Wherefore your petitioner prays that a writ of error may issue, and that he may be allowed to bring up for review before the Supreme Court of the United States said order of said Court of Appeals of the State of New York, dated Oct. 24, 1911, and filed with the Clerk of New York Co. Oct. 27, 1911, and that your petitioner may have such other and further relief in the premises as may be just, and your petitioner will ever pray, etc.

Dated New York, October 31st, 1911.

TOBIAS MILLER.

WILLIAM C. ROSENBERG,
Petitioner's Attorney, 149 *Broadway, New York City.*
WILLIAM C. ROSENBERG,
Of Counsel.

Let the writ issue as prayed. November 2, 1911.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

68 STATE OF NEW YORK,
County of New York, ss:

Tobias Miller being duly sworn, deposes and says:

I am the petitioner named in and who executed the foregoing petition. That the same is true to my own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters *he* believes it to be true.

TOBIAS MILLER.

Sworn to before me this 31st day of October 1911.

W. L. MORCK,
Commissioner of Deeds, New York City.

Read on application for Writ of Error 1st day of November 1911.

____ ____,
Ass't-Jus. Sup. Ct. U. S.

69

"EXHIBIT A."

Court of Appeals.

SECONDO GUASTI and JUAN A. BERNARD, Respondents,
against
TOBIAS MILLER, Appellant.

(Decided October 24, 1911.)

Appeal from an Order of the Appellate Division, First Department, Affirming an Order of the Special Term Which Denied a Motion on Behalf of the Defendant, Tobias Miller, to Cancel a Judgment Obtained by the Plaintiffs Against Him After a Discharge in Bankruptcy.

William C. Rosenberg for appellant.
Albert M. Yuzzolino for respondents.

HAIGHT, *J.*: The judgment sought to be cancelled was docketed in the office of the clerk of the county of New York on April 16, 1895, and the discharge in bankruptcy was obtained May 9th, 1903. The defendant's schedule, with his petition in bankruptcy, was filed September 26th, 1902, and set forth the plaintiffs' judgment in the following words:

"Name of creditor.	Residence and occupation.	Nature and consideration of debt, etc.
Guasti & Bernard.	Unknown. California.	Goods sold and delivered. Judgment was rendered in the City Court of the City of New York, April 16, 1895."

The defendant applied to the Special Term for an order canceling the judgment under section 1268 of the Code of Civil
70 Procedure, which has been repealed and is now embraced in section 150 of the Debtor and Creditor Law, and provides as follows: "At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it or filing a transcript thereof, for an order directing the judgment to be cancelled and discharged of record. It appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing such judgment to be canceled and discharged of record", etc. The Bankruptcy Act,

section 7, among other things, provides that the bankrupt shall file a schedule of his property, and also give "a list of creditors showing their residences if known, if unknown, that fact to be stated." The Special Term denied the defendant's application upon the ground, as stated by him in his memoranda filed, that the affidavits clearly show that the plaintiffs' judgment was not duly scheduled, as required by the Bankruptcy Act, basing his decision upon Columbia Bank v. Birkett (174 N. Y. 112) and Graber v. Gault (103 App. Div. 511). That order has been affirmed in the Appellate Division.

The preliminary objection has now been raised, to the effect that the application was for an order in the action, and for that reason it is not appealable to this court. The application is based upon the result of a proceeding in Bankruptcy that has been conducted in the Federal Court, and the application may be made not only by the bankrupt himself, but by any person who has succeeded to
71 the rights of the bankrupt in the property affected thereby. (Graber v. Gault, 103 App. Div. 511.) We are of the opinion that it is a special proceeding.

In considering the case upon the merits, we find that the schedule states the residence and occupation of the plaintiffs as Unknown, California; and stating the nature and consideration of the debt, it is said in the schedule to be for goods sold and delivered. The affidavits read upon the motion show that the plaintiffs were wine merchants and producers, doing business at Los Angeles, California, and had been engaged in that business for upwards of twenty-five years past; and that the claim on which the judgment was entered against the defendant was based on the acceptance of a draft drawn on the defendant by the plaintiffs containing their post office address as Los Angeles, California, which was accepted by him and was given in payment of a carload of wine purchased by said Miller from the plaintiffs in Los Angeles, California. There were additional facts made to appear by the affidavits, which we do not deem it necessary to here refer to, for we deem them sufficient to sustain the finding of the Special Term that the defendant had actual notice of the plaintiffs' residence and post — address. It also is made to appear that the plaintiffs knew nothing of the proceedings in bankruptcy, or that the defendant had instituted such proceedings until August 23, 1910, long after the discharge had been granted by the bankruptcy Court. We are, therefore, of the opinion that the claim of the plaintiffs was not properly scheduled by the defendant, and that consequently the Special Term properly denied the defendant's application. (Columbia Bank v. Birkett, 174 N. Y. 112; affirmed, 195 U. S. 345.)

The order should be affirmed, with costs.

Cullen, Ch. J., Werner, Willard Bartlett, Hiscock, and Chase, JJ., concur; Vann, J., absent.

Order affirmed.

72 [Endorsed:] 7405-1911. Supreme Court of the United States. Tobias Miller Plaintiff in Error against Secondo Guasti and Juan A. Bernard, Defendants in Error. Petition for

Writ of Error. William C. Rosenberg, Attorney for Plaintiff in Error, 149 Broadway, Borough of Manhattan, New York City. 377. Guasti v. Miller.

73 Supreme Court of the United States.

TOBIAS MILLER, Plaintiff in Error,
against
SECONDO GUASTI and JUAN A. BERNARD, Defendants in Error.

And now comes Tobias Miller, plaintiff in error, and makes and files this his assignment of errors.

I. That the Court of Appeals of the State of New York erred in refusing to direct that the judgment obtained by the defendants in error against the plaintiff in error on the 16th day of April 1895 be cancelled and discharged of record, for the reason that plaintiff in error was discharged from said judgment by a discharge in bankruptcy duly granted to him by the United States District Court for the Southern District of New York, made and filed May 9th, 1903.

II. That the Supreme Court of the State of New York and the Appellate Division of said Supreme Court of the State of New York erred in refusing to cancel said judgment for the same reason.

III. And the Court of Appeals of the State of New York and the Appellate Division of said Supreme Court erred in affirm-
74 ing the order (of the Special Term) of said Supreme Court hereinbefore referred to.

IV. That the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court of the State of New York and the said Supreme Court of the State of New York, by denying the application of the plaintiff in error, to cancel said judgment, erred in failing to give full faith and credit to the decree of the District Court of the United States for the Southern District of New York discharging the plaintiff in error from all debts made provable against his estate and which existed against him on the 26th day of December 1902.

WILLIAM C. ROSENBERG,
Attorney for Plaintiff in Error,
149 *Broadway, New York City.*

Read on application for Writ of Error November 1st 1911.

——— ———,
Ass't-Jus. Supt. Ct. U. S.

75 STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York, for the said County of New York, by virtue of the annexed writ of error which was served

upon me on the 2nd day of December 1911 and in obedience thereto, do hereby certify that the foregoing Pages Numbered from 1 to 128 inclusive contain a true and complete transcript of the record and proceedings had in said Court in the suit — Secondo Guasti and Juan A. Bernard vs. Tobias Miller mentioned in said writ of error as the same remain of record and on file in my office and that annexed hereto is the petition for the said writ of error the assignment of Errors Prayer for Reversal the citation to the writ of error with proof of service of the same, and said writ of error served upon me.

In Testimony whereof I have caused the Seal of the said Court to be hereunto affixed at my office in the City and County of New York, on the —.

[NEW YORK SEAL.] WM. F. SCHNEIDER, *Clerk.*

76 [Endorsed:] Supreme Court of the United States. Tobias Miller, Plaintiff in Error, against Secondo Guasti and Juan A. Bernard Defendants in Error. Assignment of Errors. William C. Rosenberg, Attorney for Plaintiff in Error, 149 Broadway, Borough of Manhattan, New York City.

77 Supreme Court of the United States.

TOBIAS MILLER, Plaintiff in Error,
against
SECONDO GUASTI and JUAN A. BERNARD, Defendants in Error.

And now comes Tobias Miller, the plaintiff in error, and prays for a reversal of the order of the Court of Appeals of the State of New York affirming an order of the Appellate Division of the Supreme Court of the State of New York, which in turn affirmed an order of the Special Term of the Supreme Court of the State of New York which denied the application of the plaintiff in error to cancel a judgment obtained by the defendants in error against the plaintiff in error on the 16th day of April, 1895, which said order of the Court of Appeals is dated October 24, 1911 and was duly filed in the office of the Clerk of the County of New York on the 27th day of October 1911; and he also prays for a reversal of all of said orders denying the relief prayed for.

WILLIAM C. ROSENBERG,
Attorney for Tobias Miller,
149 *Broadway, New York City.*

78 [Endorsed:] Supreme Court of the United States. Tobias Miller Plaintiff in Error against Secondo Guasti and Juan A. Bernard, Defendants in Error. Prayer for Reversal. William C. Rosenberg, Attorney for Plaintiff in Error, 149 Broadway, Borough of Manhattan, New York City.

Endorsed on cover: File No. 22,953. New York Supreme Court. Term No. 877. Tobias Miller, plaintiff in error, vs. Secondo Guasti and Juan A. Bernard. Filed December 6th, 1911. File No. 22,953.

No. 478.

Press of Fremont Payne, 47 Broad St.—'Phones, 1600 & 1636 Broad.

Argued by
WILLIAM C. ROSENBERG.

Court of Appeals

STATE OF NEW YORK.

SECONDO GUASTI and JUAN A. BERNARD,
Plaintiffs-Respondents,

against

TOBIAS MILLER,
Defendant-Appellant.

APPELLANT'S BRIEF.

Statement of Facts.

This is an appeal from an order of the Appellate Division, First Department, (Fol. 130) which affirmed an order made at Special Term, (Fol. 8) denying defendant's motion to vacate and cancel a judgment procured by the plaintiff against the defendant.

The motion to vacate the judgment was based upon Section 1268 of the Code of Civil Procedure, which provides:

> "At anytime after one year has elapsed "since a bankrupt was discharged from his "debts pursuant to the Acts of Congress relat- "ing to Bankruptcy, he may apply, upon proof "of his discharge, to the Court in which a "judgment was rendered against him, for an "order directing the judgment to be cancelled "and discharged of record. If it appears "that he has been discharged from the pay- "ment of that judgment or the debt upon "which the judgment was recovered, an order "must be made directing said judgment to be "cancelled," etc.

The motion was denied on the ground that the judgment was not duly scheduled as required by the Bankruptcy Act, upon the authority of Columbia Bank vs. Birkett, 174 N. Y. 112; Graber vs. Gault, 103 App. Div. 511. (Fol. 124.) From the order of affirmance the defendant appeals to this Court.

It is not claimed by the respondents that the appellant actually knew their address and fraudulently omitted stating the same in his schedules in bankruptcy, but it is contended that the appellant could have ascertained their address as "Los Angeles, California" had he made an inquiry.

The facts so far as material to this appeal, are undisputed.

The appellant was engaged in business in New York City in 1894 and failed in that year. (Fol. 105.) On April 16, 1895, the respondent recovered a judgment against the appellant for $1,085.40 (Fol 19.)

Over seven years thereafter, to wit: on December 26, 1902, the appellant filed a voluntary petition in bankruptcy together with his schedules, and was adjudicated on that day. (Fol. 20.)

On May 9, 1903, he was discharged from all debts and claims made provable by the Act of Bankruptcy against his estate and which existed against him on the 26th day of December 1902. (Fol. 25-26.)

The debt upon which respondents' judgment was obtained was not one of those excepted from a discharge by Section 17 of the Bankruptcy Act. (Fol. 21-22.) but was a debt in its nature, ordinarily dischargable and existed against him on the date of the filing of his petition in bankruptcy.

It is undisputed that the respondents' name appeared in the schedule and properly and sufficiently set forth the judgment in their favor, and that the address was stated to be unknown.

It is not denied or controverted that at the time of the filing of the schedules, the address was *in fact* unknown to the appellant but it is claimed that had the appellant inquired he could have ascertained the address of the plaintiffs (whether residence or business does not appear) as "Los Angeles, California." (Fol. 61.)

No claim of fraud is made, and the sworn statement of the defendant "That the residence of the plaintiff was unknown to him" is not controverted in anyway, shape or form.

POINT I.

Plaintiffs' claim against the defendant was duly and properly scheduled according to the provisions of the United States Bankruptcy Law, and the decree discharging the defendant released him from the plaintiffs' judgment.

Section 7 of the Bankruptcy Act provides "That the bankrupts shall (Sub-division 8) prepare, make oath to and file in Court, within ten days * * * * * * a schedule of his property showing the amount and kind of property, the location thereof, its money value in detail, and a list of creditors showing their residences IF KNOWN, IF UNKNOWN, THAT FACT TO BE STATED."

No question is raised but that the judgment of the plaintiffs was a claim in its nature provable under the Act and therefore would ordinarily be discharged.

Section 17 declares the effect of a discharge and states:

> "A discharge in bankruptcy shall release "a bankrupt from all his provable debts ex- "cept such as (3) have not been duly schedul- "ed with the *name* of the creditor if known "to the bankrupt."

so that the appellant is released from the respondents' judgment if it has "been duly scheduled." The question then arises has the respondents' judgment "been duly scheduled." The respondents name appears and the judgment is specified, and it is undisputed that the address of the respon-

dents was at that time unknown and that that fact was stated.

Section 7 imposes a duty upon the bankrupt to, among other things, file a list of creditors showing their residences, if known, and if unknown to state that fact; and Section 17 in effect provides that if that duty has been performed such bankrupt shall be released from the debt.

The address of the respondents in this action was in fact unknown and that fact was stated.

There is nothing in the Statute, either by words or implication imposing upon a bankrupt the duty of making inquiry as to the residence of his creditors. All that is required is that a truthful statement be made that the residence of the creditor is unknown, and to put any other construction upon the words of the Statute would be to re-write the Statute and not to construe it.

If the statement that the respondents' address was unknown, was a false or fraudulent statement, that fact would establish that the appellants had not duly scheduled the respondents' claim, in accordance with the law, and would have been sufficient to have avoided the effect of the discharge. This claim, however, the respondents do not make. Nor is it claimed that the failure to make the inquiry was done with any fraudulent or improper motive.

Absolutely no question of fraud is raised, the sole claim being that respondents' debt was not "duly scheduled."

The facts being that respondents' address was actually unknown to the appellant and that fact having been truthfully stated in the schedules, according to the direction contained in Section 7 of the Act, the claim was duly and properly scheduled.

Lent vs. Farnsworth, 94 App. Div., 99-101
(Aff. 180, N. Y., 503)
Lutz vs. Kalmus, 115, N. Y. Supp., 230
Matter of Mollner, 75, App. Div., 441
People ex rel Kenyon vs. Sutherland, 81,
N. Y., 1

In Lent vs. Farnworth, Supra; the creditor herself was dead, but the bankrupt scheduled her as the creditor instead of her executrix. In speaking of the effect of the decree discharging the bankrupt from the payment of that debt, and in reversing an order denying a motion to cancel the judgment, the Court said, page 102:

> "Had the defendant stated in his schedule that the residence of the judgment creditor was upknown to him, without question his discharge could not be successfully assailed."

In Lutz vs. Kalmus, Supra, at page 232, the Court said:

> "In the schedule filed by the debtor herein there is a positive statement that the residence of the judgment creditor is unknown. The provision of the Bankruptcy Act is therefore fully complied with."

The Court below affirmed the order of the Special Term without opinion, and the Special Term relied upon two cases as holding that the plaintiffs' judgment was not properly scheduled.

These cases are Columbia Bank vs. Birkett, 174, N. Y., 112, and Graber vs. Gault, 103, App. Div., 511, and when read in the light of the facts of the case at bar are clearly distinguishable.

The Birkett case was an action on a promissory note in which the defendant pleaded his discharge

in bankruptcy. The note was made payable to the order of the Manhattan Railway Advertising Company and by it transferred to the Columbia Bank, which at the time of the filing of petition in bankruptcy was the owner and holder of the note. The bankrupt did not schedule the Columbia Bank as a creditor at all, and it was found as a fact in the case that the bankrupt "had actual knowledge of the fact that the Columbia Bank was then (at the time of filing his schedules) the owner and holder of the note, and consequently its creditor." In other words, it is the same as if the bankrupt knowing he had a creditor, omitted to schedule him at all, and the decision in this Columbia Bank case was based upon the fact that the bankrupt had actual knowledge of his creditor and omitted to schedule him according to the duty imposed upon him by Section 7 of the Bankruptcy Act, and that therefore the decree discharging him did not discharge him from the debt of a creditor who was not scheduled.

Graber vs. Gault was a motion to discharge a judgment, and the decision in that case proceeded upon the fact as stated by the Court, at page 514, that "it does not appear from the moving papers that the judgment sought to be discharged was scheduled in the liabilities of the bankrupt."

In the case at bar, it is undisputed, if not conceded, that the address of the plaintiffs was unknown to the defendant at the time he filed his schedules, there being, therefore a full compliance with the Bankruptcy Act.

POINT II.

Unless the debt of the respondents is within one of the exceptions contained in Section 17 of the Bankruptcy Act, the discharge of the appellant is effective to release the same.

The decree of discharge (fol. 26) provides "said Tobias Miller be discharged from all debts and claims which are made provable by said acts against his estate and which existed on the 26th day of December, A. D., 1902, on which day the petition for adjudication was filed by him excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Those debts which are excepted from the operation of a discharge in bankruptcy are contained in Section 17 of the Act, and the only exception under which the respondents claim to come is subdivision 3, providing that a discharge shall not release a bankrupt from a debt which has not been duly scheduled in time, with the name of the creditor, if known to the bankrupt.

A discharge in bankruptcy is presumptive evidence that every provable debt contracted prior to the date when the petition was filed is discharged thereby, and in order to defeat the discharge the person seeking to evade its effect must show that his claim is one of those excepted from its effect.

Matter of Petersen, 137 App. Div., 435-439.

New York Institution, etc., vs. Crockett, 117 App. Div., 269-273.

Sherwood vs. Mitchell, 1 Denio, 435.

Brereton vs. Hull, 1 Denio, 75.
Harrison vs. Lourie, 49 How., 124-128.
Stevens vs. King, 16 App. Div., 377.
Chapman vs. Forsythe, 2 How., (U. S.), 202-208.

The decree discharging the appellant discharged him, in words, from all his debts which were provable against his estate on the date mentioned, "excepting such debts as are by law excepted from the operation of a discharge."

It is a well established rule of statutory construction that one claiming the benefit of an exception contained in a statute, has the burden of bringing himself squarely within such exception. In order to defeat the effect of the discharge the burden was upon the respondents to establish that their claim was one of those excepted by Section 17 of the Bankruptcy Act from the full operation of the discharge granted according to that law.

Matter of Petersen, supra.
Sherwood vs. Mitchell, supra.

In this the respondents have failed. In order to bring themselves within the only material exception contained in Section 17 they were required to establish at least the one fact that the time of the filing of the schedules by the appellant he *knew* the address, not that it might have been ascertained and thereby create, by implication, a further exception to the effect of a discharge not contained in the law.

To hold otherwise would do violence to the rule of statutory construction that where the law making body have in express words provided exceptions such provisions are deemed exclusive and to forbid the creating of any further exceptions by implication.

Matter of Herring 133 App. Div., 293-295; affirmed 196 N. Y., 218.
Suth. Stat. Const., Section 328.

This construction is true with respect to every other claim excepted from the operation of a discharge by Section 17, and should be true with respect to the exception mentioned in sub-division 3.

Take for instance any other debt excepted from the operation of a discharge by Section 17 of the Bankruptcy Act, such as a liability created by fraud and embezzlement. The burden would certainly be upon the person having such a claim against the bankrupt, to show that his claim was such a claim, as was founded in fraud and embezzlement. So also all the other debts or claims provided for in Section 17. The burden is always upon the person asserting the exception to bring himself within its terms.

All liabilities and debts of a bankrupt existing prior to the filng of a petition for adjudication are presumptively discharged unless such claim is one of those mentioned in Section 17, and the burden must necessarily be upon the person claiming the benefit of such exception.

POINT III.

The order appealed from should be reversed, with costs in all courts, and the motion granted, with costs.

Dated, New York, October 2nd, 1911.

Respectfully submitted,

JESSE S. EPSTEIN,
Attorney for the Appellant.

WILLIAM C. ROSENBERG,
Of Counsel.